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NO. 83-757

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

WILLIAM R. McCANN,
Petitioner

VS.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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APPENDIX

Georgia Court Judgments and Decrees:

Court of Appeals of the State of Georgia

Atlanta, Georgia, December 22, 1982

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65357. William R. McCann v. The State

This is an appeal from a conviction for driving under the influence of alcohol in which a statutory presumption of Code Ann. §68A-902.1(b)(1) that "if there was at that time (of driving) 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person is under the influence of alcohol," is attacked as unconstitutional.

The issue was preserved for appeal when the trial court after instructing on the presumption in his charge failed to ask counsel if there were any exceptions or objections to the charge. White v. State, 243 Ga. 250.

No cases have been found in which the constitutionality of this presumption has been ruled upon the appellate courts of this state. Therefore, the Supreme Court has jurisdiction over this case. Code Ann. §2-3104; Burke v. State, 205 Ga. 520.

Moreover, as there may be some question as to whether the issue was properly raised at the trial level, the Supreme Court should make that determination. Compare, Barnes v. State, 244 Ga.

302(1) and Simmons v. State, 246 Ga. 390, 391, with Arp v. State, 249 Ga. 403(1) and Hardison v. Haslam, 250 Ga. 59(3).

Supreme Court of Georgia
Atlanta, February 4, 1983
The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

39574. McCann v. The State.

In this appeal from a DUI conviction, the statutory presumption of Code Ann. §68A-902.1(b)(3) -- that driving with a .10% or more blood-alcohol content constitutes DUI -- is attacked as unconstitutional under the 14th Amendment to the United States Constitution and the corresponding section of the Georgia Constitution, on the ground that it "usurps the fact-finding duties of the

jury, and relieves the State of its burden to prove all of the elements of a criminal offense beyond a reasonable doubt."

Although this particular statute has not been upheld against this specific constitutional attack; nevertheless, the issue involved is a mere application of the Constitution to this statute, of which the Court of Appeals has jurisdiction. See Garrett v. Dept. of Public Safety, 237 Ga. 413, and Johnson v. State, 236 Ga. 370, cited therein.

Accordingly, the appeal is transferred to the Court of Appeals.

Court of Appeals of the State of Georgia
Atlanta, Georgia, June 21, 1983
66203. McCann v. The State (Bi-101)

BIRDSONG, Judge.

William B. McCann was convicted of speeding and driving under the influence of alcohol. The only evidence offered by the state showed that McCann was detected by radar speeding approximately 60 mph in a 45 mph zone. Upon being stopped, the officer detected the odor of alcohol upon McCann's breath and secured McCann's consent to take a breatholizer test, which indicated an alcohol level of .11. Apparently it was upon the basis of the speed, odor of alcohol, and the alcohol level that McCann was charged with DUI, inasmuch as the officer detected no erratic driving (other than speeding) or aberrational physical conduct. The trial court charged upon the legal presumption raising from the .11 breatholizer reading it is upon this charge that McCann brings this appeal. McCann asserts that the

statute is unconstitutional for mandating a presumption of intoxication if the reading is above .10 and that the charge based upon the statute shifted the burden to the appellant.

Held:

1. We reject the constitutional argument offered by Appellant. This case was transferred to the Supreme Court for its consideration of the constitutional argument. That court transferred the case back to this court without opinion or other comment. The Supreme Court's refusal to review McCann's constitutional challenges to O.C.G.A. §40-6-392 renders such contention without merit. Cassells v. Bradlee Management Services, 161 Ga. App. 325, 326 (1) (291 SE2d 48); Denton v. State, 154 Ga. App. 427 (2) (268 SE2d 725).

2. In construing the charge of the court in relation to a shifting of the burden, we have carefully examined the relevant portions of the charge in context with the entire charge. In this regard the court charged: "Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving. . .a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of such person's...breath...shall give rise to certain inferences or persumptions. Now, relative to presumptions, I charge you that all legal presumptions are rebuttable...but in truth, there is but one type of presumption in the strict legal meaning of the word and that is merely a

general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law, is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is offered, this does not alter the rule of

law that there is no burden whatsoever on a defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the state as I have previously charged you, to prove the guilt of the defendant beyond a reasonable doubt."

In this case, appellant offered evidence through the arresting officer, his wife and himself that he had consumed a minimal amount of beer over a sustained period, exercised vigorously while playing golf, eaten a meal, and both his wife and the officer indicated he appeared "normal". Thus in accordance with the charge of the court, the "presumption" raised by the .11 reading "disappeared" in the face of this contradictory evidence, and the jury was required to determine the issue of

driving while intoxicated based upon the "usual rules of evidence." Thus, the jury was required to determine the state of intoxication (i.e., whether McCann was less safe a driver because of alcohol) based upon the appellant's asserted "normal" condition in comparison with his admitted consumption of alcoholic beverages, manifested by his conduct in speeding in disregard of the posted limit and the odor upon his breath.

Viewing the charge of the court in its entirety, we are amply satisfied that the charge on the "presumption" authorized by a breatholizer reading of more than .10 alcohol in the blood created merely a "permissive presumption" of the type considered in County Court of Ulster County v. Allen, 442 U.S. 140 (99 SC 2213, 60 LE2d 777). Such a presumption

allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecutor of a basic one. Moreover, we are conviced that the charge in this case did not place any kind of burden upon the appellant. Skrine v. State, 244 Ga. 520, 521 (260 SE2d 900); Burdett v. State, 159 Ga. App. 394(2) (283 SE2d 622). We find no merit in the argument that the charge of the court shifted the burden to the appellant.

Judgment affirmed. Shulman, C. J., and McMurray, P. J., concur.

Court of Appeals of the State of Georgia
Atlanta, July 8, 1983
The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:
66203. William R. McCann v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it is hereby denied.

Alton Hawk, Clerk

Clerk's Office, Supreme Court of Georgia

Dear Sir:

Case No. 40203.

McCann v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the Justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

In The State Court of Clarke County

The State of Georgia

vs.

William R. McCann

Case No. 23,999

Charge: DUI (Verdict of Guilty)

November Term, 1980.

The Defendant being before the Bar of the Court and showing no reason why the sentence of the Court should not be pronounced;

IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said William R. McCann be, and herein is, sentenced to confinement in (such institution under the jurisdiction of the State Board of Corrections as the Director of Corrections may direct), where the said Defendant shall be confined at labor for a term of 12 months, to be computed according to law...

...The Court having examined the cause, it is further ordered that the above sentence may be served on probation...

...IT IS FURTHER ORDERED by the Court that the Defendant pay a fine of $250.00 as a condition precedent to probation...

This the 11th day of December, 1980.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke County, Georgia

IN THE STATE COURT OF CLARKE

COUNTY, GEORGIA

THE STATE

VS.

WILLIAM R. McCANN

FILE NO. 23999

ORDER

Motion for New Trial in this case coming on regularly to be heard and opportunity for argument being afforded counsel, it is considered, ordered, and adjudged that a new trial be, and the same is, hereby refused.

This the 1st day of September, 1982.

/s/ Grady C. Pittard, Jr.
Judge, State Court of Clarke County, Georgia

Statutory Provisions:

Official Code of Ga. Ann. §40-6-391 (Michie, 1982), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Driving under the influence of alcohol or drugs.

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

1. Under the influence of alcohol.

Official Code of Ga. Ann. §40-6-392 (Michie, 1983), formerly Ga. Code Ann. §68A-902 (Harrison, 1974):

Chemical tests for alcohol or drugs in blood.

(a) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, evidence of the amount of alcohol or drug in a person's blood at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply:

(1) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol, as

prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(3) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391;

(4) If there was at that time 0.12 percent or more by weight of alcohol in the person's blood, the person shall be in violation of paragraph (4) of subsection (a) of Code Section 40-6-391.

Constitutional Provisions:

U. S. Const. Amend. 14

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant Sections of Jury Charge at Petitioner's Trial:

The Defendant enters upon this trial with a presumption of innocence in his favor and that presumption remains with him

throughout the trial unless and until it is overcome by evidence submitted to you which establishes his guilt beyond a reasonabe doubt. (T.28, line 21 - 29, line 1)...

...Now, Ladies and Gentlemen, the law of this state provides that it is unlawful for any person who is under the influence of alcohol to drive or to be in actual physical control of any moving vehicle on the public highways or elsewhere in this state. The offense condemned in this statute may be committed in more than one way: first, by a person driving a moving vehicle while under the influence of alcohol and second, by a person being in actual control of a moving vehicle while under the influence of alcohol. Now, proof of either one of these prohibited acts will support a conviction. Now, the

essential ingredients of the offense are the driving or the being in control of a moving vehicle by the accused at a time while under the influence of some alcohol. The State need now show that the defendant was drunk, but only that he was under the influence of alcohol. In the eyes of the law, the operator of a motor vehicle is under the influence of alcohol when he is so affected by it as to make it less safe for him to drive, operate, or be in control of a vehicle than it would be if he were not affected by such alcohol. This is the true rule in such cases and anything less than this would not authorize a verdict of guilty. Now, whether the Defendant in this case was under the influence under this rule is an ultimate fact you must decide. This is not a matter of opinion alone,

but a matter of proof and it may be proved either by direct or circumstantial evidence, including the opinion of witnesses whom you think worty of belief. (T.32, line 10 - 33, line 12)...

...Now, the State of Georgia considers that persons who are under the influence of alcohol while operating a motor vehicle constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways of this state, shall be deemed to have given consent to a chemical test or tests of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a moving vehicle while under the influence of alcohol. The test or tests

shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a motor vehicle upon the highways or elsewhere in this state while under the influence of alcohol. Now, upon the trial of any criminal proceeding arising out of acts alleged to have been committed by a person while driving or in actual physical control of a vehicle while under the influence of alcohol, evidence of the amount of alcohol in a person's blood at the alleged time as determined by a chemical analysis of such person's blood, urine, breath, or other bodily substance shall be admissible. Where such a chemical test is made, the following provisions shall apply. Chemical analysis of the person's blood,

urine, breath, or other bodily substance to be considered valid under the provisions of this law shall have been performed according to methods approved by and by an individual possessing a valid permit issued by the State Crime Laboratory for this purpose. The State Crime Laboratory is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the State Crime Laboratory. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

Now, upon this trial of any criminal proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a moving vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analyses of such person's blood, urine, breath, or other bodily substance shall give rise to certain inferences or presumptions.

Now, relative to presumptions, I charge you that all legal presumptions are rebuttable. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law, presumptions of fact, conclusive presumptions, disputable presumptions, but in truth, there is but one type of presumption in

the strict legal meaning of the word and that is merely a general rule of law that under some circumstances in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion or fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence the ultimate fact in question. It was not in and of itself evidence, merely an arbitrary rule imposed by law to be applied in the absence of evidence and whenever evidence contradicting the presumption is offered, the latter disappears entirely and the triers of the fact are bound to follow the usual rules of evidence in reaching their ultimate conclusions of fact. However, in mentioning the fact that whenever evidence contradicting the presumption is

offered, this does not alter the rule of law that there is no burden whatsoever on a Defendant to offer any testimony or any evidence whatsoever in support of his innocence. The burden is entirely on the State as I have previously charged you, to prove the guilt of the Defendant beyond a reasonable doubt.

These, then, are the presumptions of law which are raised and which may be considered by you in your deliberations. First, if there was at the time of making the test, breath test, blood test, urine test, or other bodily substance, there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol. If there was at that time in excess of 0.05 percent but less than 0.10 percent by

weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol. Third, if there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol. (T.34, line 23 - 38, line 15).